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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

GERALD N. KLAUBER,

*Petitioner,*

v

ATTORNEY GRIEVANCE COMMISSION OF MARYLAND,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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## QUESTIONS PRESENTED

1. In an attorney licensing proceeding following a criminal conviction for mail fraud, does the use of a rule that every allegation in the criminal indictment is taken as conclusively proven, violate due process, where the criminal jury had been instructed that it need not find each and every allegation proven in order to convict.

2. Does mail fraud still require a finding of actual fraud, as opposed to constructive fraud, given the expanded use of the mail fraud statute in recent years to cover behavior not previously believed to be within its purview.

3. May the Maryland Court of Appeals overule its own earlier decision after Petitioner relied on that decision in deciding to forego an evidentiary presentation, where that earlier decision involved the very same parties, on the very same record, and addressing the very same issue?

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GERALD N. KLAUBER,

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*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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Petitioner Gerald N. Klauber respectfully moves this Court to review both the opinion and judgment of the Court of Appeals of Maryland entered in this proceeding on February 10, 1981, and the denial of a Petition for Rehearing, that denial dated March 24, 1981.

## OPINIONS BELOW

The letter/order indicating that the Petition for Rehearing had been denied is unpublished and is attached hereto as Appendix I. The Opinion of the Court of Appeals of Maryland ordering that Petitioner be disbarred is not yet published and is attached hereto as Appendix II. Additionally, there are two prior reported decisions relating to

earlier aspects of the instant case: *Attorney Grievance Commission v. Klauber,* 283 Md. 597, 391 A.2d 849 (1978) and *Attorney Grievance Commission v. Klauber,* 284 Md. 306, 396 A.2d 253 (1979). Finally, the instant proceeding, which is an attorney disbarment proceeding, arose out of and subsequent to Petitioner's conviction for mail fraud (18 U.S.C. 1341) and prohibited practices (18 U.S.C. 1961 *et. seq.*) in the United States District Court for the District of Maryland. That conviction was affirmed in *United States v. Klauber,* 611 F.2d 512 (4th Cir. 1979), *cert. denied* 100 S. Ct. 1835 (1980).

## JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on February 10, 1981. A timely Petition for Rehearing was denied on March 24, 1981. This Court's jurisdiction is invoked under 28 U.S.C. 1257 (3).

## CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED

**Constitution of the United States, Amendment XIV:**

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside . . . nor shall any State deprive any person of life, liberty, or property without due process of law. . .

**Federal Mail Fraud Statute — 18 U.S.C. §§ 1341:**

> Whoever, having devised or intending to devise any scheme or artifice to defraud, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, . . . shall be fined not more than $1,000 or imprisoned not more than five years, or both.

**Maryland Rules of Procedure, Rule BV 10(e)(1), Ann. Code of Md., Volume 9C (1977 Replacement Volume);**

*Conviction of Crime — Adjudication of Misconduct.*

1. Proof of Guilt.

In a hearing of charges pursuant to this Rule, a final judgment by a judicial tribunal in another proceeding convicting an attorney of a crime shall be conclusive proof of the guilt of the attorney of that crime. A plea or verdict of guilty, or a plea of nolo contendere followed by a fine or sentence, is a conviction within the meaning of this Rule. A final adjudication by a judicial tribunal in a disciplinary proceeding that an attorney has been guilty of misconduct is conclusive proof of the misconduct in the hearing of charges pursuant to this Rule.

## STATEMENT OF THE CASE

On December 1, 1977, Petitioner Gerald N. Klauber was indicted by a federal grand jury in the District of Maryland[1] and charged with sixteen counts of mail fraud in violation of 18 U.S.C. 1341 and one count of prohibited practices in violation of 18 U.S.C. 1962 *et. seq.*[2]

[1] Also indicted with Respondent was his law partner Howard Fine. Prior to Respondent's trial, however, the two cases were severed, and ultimately, the indictment against Fine was dismissed.

[2] "Prohibited practices", sometimes referred to as "racketeering", as defined in 18 U.S.C. § 1961 (1) and (5), simply makes unlawful two acts of mail fraud committed within a ten year period. In the instant case, it was agreed by Petitioner and Respondent that since the prohibited practices conviction represents nothing more than two additional mailings within the context of the overall indictment, that for the purpose of this licensing matter, the same mail fraud analysis applies with equal force to the prohibited practices conviction. For convenience sake, in this Petition, when referring to mail fraud, Petitioner intends to include reference to prohibited practices as well.

On March 27, 1978, a jury trial commenced in the United States District Court for the District of Maryland, the Honorable Alexander Harvey, II, presiding. The trial lasted approximately four weeks, and on April 21, the jury returned a verdict of guilty on each count. On June 21, 1978, Respondent was sentenced to a term of five years imprisonment for each count, all sentences to run concurrently. On June 27, 1978, a timely appeal was noted to the United States Court of Appeals for the Fourth Circuit.

On June 28, 1978, during the pendency of the criminal appeal, Respondent, pursuant to Md. Rule BV 16, initiated suspension proceedings against Petitioner in the Maryland Court of Appeals which has original jurisdiction over attorney discipline matters. BV 16, at that time, provided for suspension of an attorney prior to exhaustion of criminal appellate review if that attorney had been convicted of an offense involving moral turpitude. In the context of the initial suspension action, the only evidence presented were the jury instructions from the criminal case, the indictment, and a certified copy of the judgment/commitment order.

Based on that evidentiary showing, the Court of Appeals concluded that mail fraud was not an offense necessarily involving moral turpitude and held that the record in the instant case was too ambiguous to justify a finding of moral turpitude. Accordingly, the Court dismissed the Petition. *Attorney Grievance Commission v. Klauber*, 283 Md. 597, 391 A.2d 849 (1978) (hereinafter referred to as "*Klauber I.*").

Following that dismissal, Respondent re-filed its Petition to Suspend on October 11, 1978. The second Petition, however, purported to be pursuant to BV 16, as amended, effective July 1, 1978. The amended version no longer required a finding of moral turpitude in order to suspend. Following oral argument, the Court of Appeals held that

since Petitioner's criminal conviction was final as of June 21, 1978, ten days prior to the effective date of amended BV 16, to suspend Petitioner under the amended rule would constitute an unlawful retroactive application of that rule. Accordingly, the Petition was dismissed. *Attorney Grievance Commission v. Klauber,* 284 Md. 306, 396 A.2d 253 (1979) (hereinafter referred to as *"Klauber II.")*

On November 29, 1979, the United States Court of Appeals affirmed the conviction. See, *United States v. Klauber,* 611 F.2d 512 (4th Cir. 1979). Following that Court's denial of a Motion for Rehearing With a Suggestion for Rehearing *En Banc,* Petitioner filed a Petition for Writ of Certiorari to this Court. On April 21, 1978, that Petition was denied. See, 100 S. Ct. 1835.

On April 24, 1980, three days after denial of the Petition for Writ of Certiorari, Bar Counsel filed yet a third Petition to Suspend pursuant to Md. Rule BV 16. This third suspension action appeared to be based on the pre-July 1, 1978, version of BV 16. Prior to oral argument on the third Petition, however, the action was voluntarily dismissed by Bar Counsel.

On May 28, 1980, notwithstanding that Petitioner was incarcerated out of state, Bar Counsel filed a Petition for Disciplinary Action. This final Petition simply alleged that Respondent had been convicted of mail fraud, that the conviction was final, and that, accordingly, Respondent had violated Disciplinary Rules 1-102, 2-103, 3-103, 7-101, 7-102, and 9-102. *See,* Md. Rule 1230 and Appendix F thereto, *Ann. Code of Md.,* Volume 9C (1977 Replacement Volume). As with a suspension action, the Court of Appeals has original jurisdiction. Pursuant to Md. Rule BV 9(b), however, the matter was referred to the Honorable David Ross of the Supreme Bench of Baltimore City for a fact-gathering hearing, the relationship between the Court of Appeals and Judge Ross being that of a Chancel-

lor in Equity and a Master. *See, Bar Association of Baltimore City v. Marshall,* 269 Md. 510, 515-17, 307 A.2d 677, 680-81 (1973).

On August 25, 1980, a hearing was held before Judge Ross. On October 24, 1980, he issued Findings of Fact and Conclusions of Law as well as an accompanying Memorandum. In his findings, he ruled that mail fraud is an offense which *per se* involves moral turpitude and that Respondent, simply by dint of the conviction, had violated DR 1-102 (A) (3), (4), and (5). Those provisions prohibit an attorney from engaging in conduct involving moral turpitude, fraud, and conduct prejudicial to the administration of justice, respectively.

Petitioner filed timely exceptions in the Court of Appeals to the Master's Findings, and Respondent filed a Recommendation for Sanction. On January 16, 1981, oral argument was held before the Court of Appeals. At that time, it was abundantly clear that the Court understood and preceived *Klauber I* in the same light as had Petitioner. Moreover, Bar Counsel conceded in oral argument that Petitioner's criminal conviction may rest solely on a jury determination that Petitioner, in the representation of personal injury claimants against the insurers of those responsible for the injuries, failed to reveal to insurance adjusters that the treating physicians would accept a reduction of an otherwise legitimate medical bill.

In an apparent attempt to provide an opportunity to cure the deficiencies in the case, the Court issued an Order, dated January 16, 1981, requiring the parties to brief whether the Court could, *sua sponte,* supplement the record with the criminal trial transcript and the briefs and joint appendix from the criminal appeal. Timely Memoranda were filed in accordance with that Order.

On February 10, 1981, the Court issued its Opinion holding that Petitioner had been convicted of a crime necessarily involving moral turpitude and ordering that he be disbarred. That Opinion not only failed to address the supplemental questions but also purported to reverse *Klauber I* upon which Petitioner had relied. *See,* Appendix II.

Petitioner then found himself disbarred for having relied solely and completely on a reported decision of the Court of Appeals at an earlier stage of the same proceedings between the same parties on the same record. Accordingly, on March 10, 1981 Petitioner filed a timely Petition for Rehearing. On March 24, 1981, the Court issued a Letter Order denying the Petition for Rehearing without comment. *See,* Appendix I.

## STATEMENT OF FACTS

Other than presenting the indictment, the judgment/commitment order, and the jury instructions, Bar Counsel made no factual showing whatsoever. Petitioner did not contest proof of the fact of conviction itself, nor did he attack the integrity of that conviction by attempting to re-litigate the issues previously raised in the Fourth Circuit. See Md. Rule BV 10 (e)(1). It was Bar Counsel's contention, however, that all of the various allegations in the indictment were taken as conclusively proven by operation of BV 10 (e)(1). It was Petitioner's position, on the other hand, that since the jury had been expressly instructed that it need not find all of the various allegations in the indictment to be true in order to convict, it was now unfair, and in fact, unconstitutional, to take each of those allegations as proven since the jury's verdict in no way represented an unambiguous finding as to the acts which Petitioner was alleged to have committed.

The indictment itself, reproduced as Appendix III, presented a range of behavior alleged to be fraudulent, including: knowingly referring claimants to doctors who then supplied inflated bills; encouraging clients to take time off from work when such leave was unnecessary; paying kickbacks to insurance adjusters; paying gratuities to individuals who had referred cases; and failing to reveal to the insurance companies that the physicians would accept reduced payment for otherwise legitimate bills in order to avoid the inconvenience of testifying in court. The most serious allegation — that regarding payment of kickbacks — was not even submitted to the jury since the Government failed to adduce even a shred of evidence to justify that charge. As to the other allegations, each was hotly contested at the criminal trial, and the criminal jury was not asked for, nor did it give any indication of, which of those allegations was proven.

Given the absence of any factual development in the instant case and given the Court's prior holding in *Klauber I* that Petitioner's conviction, *on the very same record,* did not involve moral turpitude, there was neither an adequate record upon which to find that Petitioner had violated the relevant Disciplinary Rules nor to impose the sanction of disbarment.[3]

In short, Bar Counsel presented no evidence that had not been previously presented at the rejected suspension hearings. Since there were no "facts" presented, the Court had no basis upon which to rely for its decision to sustain its findings of violation of the Disciplinary Rules except to rule, as it did, that a conviction for mail fraud, by the very nature of that offenses, involves a violation of DR1-102 (A)(3), (4), and (5). Moreover, even assuming a violation,

[3] Under Maryland law, for example, the payment of gratuities or the use of runners is not a disbarable offense. See, *Klauber I*, 283 Md. at 602, 391 A.2d at 852; *Attorney Grievance Commission v. Freedman*, 285 Md. 298, 402 A.2d 75 (1979).

the absence of a factual record left the Court without any basis for knowing what sanction would be appropriate.

## REASONS FOR GRANTING THE WRIT

### I.

**THE USE OF A CONCLUSIVE PRESUMPTION TO TAKE THE ALLEGATIONS IN THE CRIMINAL INDICTMENT AS CONCLUSIVELY PROVEN, WHERE THE JURY HAD BEEN INSTRUCTED THAT IT NEED NOT FIND EACH OF THOSE ALLEGATIONS AS PROVEN, VIOLATES DUE PROCESS.**

Md. Rule BV (10) (e)(1) provides, in pertinent part:

> In a hearing of charges pursuant to this Rule, a final judgment by a judicial tribunal in another proceeding convicting an attorney of a crime shall be conclusive proof of the guilt of the attorney of that crime.

From the inception of this action, Petitioner did not controvert the fact of his criminal conviction. At the same time, however, he vigorously contested the factual inferences which could be legitimately inferred from that conviction given that the jury had been instructed that it need not find that all the allegations in the indictment had been proven in order to convict. Since Bar Counsel made no effort to develop the underlying facts, the Court of Appeals' disposition of the matter represents reliance upon a conclusive presumption in violation of due process.

It is a now well established aspect of Fourteenth Amendment due process that a conclusive presumption is unconstitutional if there is an inadequate nexus between the proven fact and the inferred fact. In *Stanley v. Illinois*, 405 U.S. 645 (1972), the Court was asked to review an Illinois statute which provided that an unmarried father could not retain custody of his own children upon the death of the mother, unless he pursued formal adoption procedures. In holding that there was an insufficient connection between the proven fact (an unmarried father)

and the inferred fact (unfitness as a father) the Court stated:

> The establishment of prompt efficacious procedures to achieve legitimate state ends in a proper state interest worthy of cognizance in constitutional adjudication. But the constitution recognizes higher values than speed and efficiency. (footnote omitted). Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.
>
> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues . . . it needlessly risks running roughshod over the important issues . . . 405 U.S. 656-57

See, also, *Vlandis v. Kline,* 412 U.S. 441 (1973); *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974); *Bell v. Burson,* 402 U.S. 535 (1972); *Carrington v. Rush,* 380 U.S. 89 (1965); and *Andrews v. Drew Municipal Separate School District,* 507 F.2d 611, *cert. granted,* 423 U.S. 820, *cert. dismissed,* 425 U.S. 559 (1975).

It is clear from *Stanley* and its progeny that a two-step analysis is employed. First, it is necessary to insure that the inferred fact flows inexorably from the proven fact. Second, it must be determined that no reasonable alternative means exists by which the inferred facts may be proven.

Applying that analysis to the instant case, it must first be noted that it was not necessary for the Government to prove each aspect of the indictment at the criminal trial. See, *e.g., United States v. West,* 549 F.2d 545 (8th Cir.), *cert. den.* 430 U.S. 956 (1977). Consequently, the jury

finding, i.e. the proven fact, does not necessarily lead to the inferred fact, i.e. Petitioner engaged in disbarrable conduct such as knowingly submitting false and fraudulent medical bills to insurance carriers. All that can be inferred is the minimum which would support conviction — namely, that Petitioner failed to reveal to the insurance carriers that the physicians would accept less than the bill (legitimately) recited in order to avoid the inconvenience of litigation, or that he employed runners, neither of which support disbarment.

Secondly, there is a reasonable alternative means by which Bar Counsel could have proceeded: it could have called witnesses and presented testimony. It is important to note that not one witness was called and not one shred of testimony taken. Consequently, the entire case against Petitioner was created and "proven" by way of the statutory conclusive presumption.

Because of the unfairness to Petitioner and the importance of the principles relative to conclusive presumptions, Petitioner respectfully submits that this Court should grant the Petition to review the judgment of the Court of Appeals.

## II.

**REVIEW SHOULD BE GRANTED TO CLARIFY WHETHER A SHOWING OF ACTUAL FRAUD, AS OPPOSED TO CONSTRUCTIVE FRAUD, IS STILL REQUIRED TO SUPPORT A CONVICTION FOR MAIL FRAUD.**

It is Petitioner's position that the crime of mail fraud has been expanded in recent years to include activity not heretofor believed to be within its purview. Given that expansion, it can no longer be said that mail fraud necessarily embraces actual fraud, and consequently it cannot be said that that offense necessarily includes moral turpitude under the State law definition of that term.

The most significant example of the broadened notion of mail fraud relates to William A. Rodgers, one of the co-defendants in *United States v. Mandel, et al.*, 591 F.2d 1347 (4th Cir.) *rev'd on rehearing,* 602 F.2d 653, *cert. denied* 100 S. Ct. 1647 (1979). *Mandel* involved the mail fraud prosecution of Maryland's former governor as well as several of his associates, including Rodgers. The gist of the prosecution against Rodgers was that he had failed to reveal a beneficial interest in a Maryland racetrack. When the Fourth Circuit reviewed the convictions on appeal, it stated the following with respect to the nature of the case:

> Based upon the indictments and record in this case, Appellants could have been convicted of mail fraud only if one or more of the following schemes to defraud were proven: a scheme involving the bribery or attempted bribery of Governor Mandel; or, a scheme involving the fraudulent misrepresentation of facts to, or such concealment of true facts from, the Maryland General Assembly and the Maryland Racing Commission for the purpose of obtaining legislation, racing days and other things financially beneficial to those interested in Marlboro and later Bowie. 591 F.2d at 1365.

Since Rodgers, as well as the other Defendants, had been acquitted of any and all bribery charges, and since the judge's instructions removed the concept of bribery from the mail fraud counts, the defendants' conviction was based totally on a failure to reveal a beneficial interest in the racetrack. Yet, it was undisputed that the practice of holding such an undisclosed interest was not only legal under state law, but moreover, was the accepted practice at the time. Consequently, Rodgers' conviction represents, at most, a conviction for constructive fraud.

While many cases continue to recite that actual fraud remains a requirement, the factual reality belies those comments, and Petitioner's own conviction represents a

further example. As expressly conceded by Respondent at the January 16, 1980, hearing, Petitioner's criminal conviction may rest, simply, upon the following predicate:

1. Petitioner represented claimants in personal injury cases and referred the claimants to physicians.
2. The physicians forwarded bills to Petitioner who, in turn, mailed these bills to the insurance companies representing the party purportedly liable for the injury.
3. The claimants all had legitimate injuries, and the bills represented proper charges.
4. In order to facilitate settlement, avoid filing suit, and eliminate the need for the physicians to come to court, Petitioner could forward to the physicians less than the bills indicated.
5. The fact that the physicians would accept less than the amount recited on the bill was not disclosed to the insurance company.

Those allegations, even coupled with proof that Petitioner may have paid gratuities to those who referred him cases, constitute nothing more than constructive fraud. Since under State law, moral turpitude embraces only actual fraud and not constructive fraud, see, e.g. *Maryland State Bar Association v. Agnew*, 271 Md. 543, 318 A.2d 811 (1974), the finding that Petitioner was convicted of an offense necessarily involving moral turpitude is unequivocally wrong. The decision of the Court of Appeals in which Petitioner was disbarred rests fundamentally on language referring to an antiquated notion of fraud. Accordingly, this Court should grant the Petition in order to clarify the kind of fraud necessary to sustain a conviction under 18 U.S.C. 1341.

## III.

**THE COURT SHOULD GRANT THE PETITION IN ORDER TO CORRECT THE GROSS INJUSTICE IN THAT THE COURT OF APPEALS, WITHOUT ANY NOTICE WHATSOEVER, REVERSED AN EARLIER DECISION BETWEEN THE SAME PARTIES, ON THE SAME RECORD, ADDRESSING THE SAME ISSUE, UPON WHICH PETITIONER HAD RELIED.**

As detailed above, the only evidence presented in the hearing on the Petition for Disciplinary Action was the criminal indictment, the judgment/commitment order, and the criminal trial jury instructions. This showing was identical to the showing made in *Klauber I* in which the Court of Appeals held that not only was mail fraud not necessarily an offense involving moral turpitude, but also, on that record, it could not be said that Petitioner's offense involved moral turpitude.

After the filing of the Petition for Disciplinary Action, numerous conversations occurred between counsel for the respective parties relative to Bar Counsel's anticipated evidentiary showing. Ultimately, Bar Counsel gave its assurance that only the indictment, judgment/commitment order, and jury instructions would be introduced. See Appendix IV. Based on that assurance and based on *Klauber I,* Petitioner made no evidentiary showing of his own. That it was reasonable for Petitioner to rely on that representation and that it was reasonable to reply on Petitioner's reading of *Klauber I* simply cannot be disputed. However, the Court of Appeals first overruled *Klauber I* in its opinion, see Appendix II, and then penalized Petitioner for not making a factual presentation in mitigation by ordering disbarment. *Id.*

Further aggravating the situation is that *Klauber I,* under State law principles, should have acted either as the law of the case or as collateral estoppel. It is not entirely clear whether the suspension action of *Klauber I* is the

same case as the instant one notwithstanding that all parties treated it as such. Assuming, however, that it is an earlier aspect of the instant matter, then its holding is, and should have been, binding on the Court of Appeals. See, *Acting Director, Dept. of Forests and Parks v. Walker,* 39 Md. App. 298, 301-02, 385 A.2d 806, 809 (1978), *affirmed sub nom, Walker v. Acting Director, Dept. of Forests and Parks,* 284 Md. 357, 396 A.2d 262 (1979).

If, on the other hand, *Klauber I* is a distinct case, collateral estoppel nonetheless dictates the same result: there was identity of issues; a final judgment on the merits in the first action; identity of parties; and the party against whom the estoppel applies had a fair opportunity to litigate the issue. See, *Washington Suburban Sanitary Commission v. TKU Associates,* 281 Md. 1, 376 A.2d 505 (1977). Accordingly, whether the applicable principle be the law of the case or collateral estoppel, the Court of Appeals should have been bound by *Klauber I.* At the very least, if the Court determined that *Klauber I* should be overruled, it should have remanded the matter to the Master to permit Petitioner to make a factual presentation. This argument was addressed by Petitioner in his Petition for Rehearing which was denied without comment by the Court of Appeals. See Appendix I.

Because the Court of Appeals exercises original jurisdiction over attorney discipline matters, there is no court available to which Petitioner has a right of appeal. The Court of Appeals has significantly departed from sound jurisprudential principles, and the only available forum in which Petitioner can have the obvious unfairness rectified is this Court. Accordingly, Petitioner most earnestly requests the Court to grant the Petition.

## CONCLUSION

For the foregoing reasons, Petitioner requests this Court to issue a Writ of Certiorari to review the judgment and opinion of the Court of Appeals of Maryland.

Respectfully Submitted,

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# APPENDIX I

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COURT OF APPEALS OF MARYLAND

March 24, 1981

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Re: Attorney Grievance Commission of Maryland v.
Gerald Ney Klauber
Misc. Docket (Subtitle BV) No. 5
September Term, 1980

Dear Mr. Marr:

This is to advise that the petition for rehearing filed in the above entitled matter has been denied by the Court this date.

Judge Eldridge did not participate in the consideration of this petition.

Very truly yours,

JAMES H. NORRIS, JR.
Clerk.

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APPENDIX II

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*In the Court of Appeals of Maryland*

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*Misc. Docket (Subtitle BV)*

*No. 5*

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*September Term, 1980*

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*Attorney Grievance Commission of Maryland*

*v.*

*Gerald Ney Klauber*

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*Murphy, C.J., Smith, Digges, Cole, Davidson and Gilbert, Richard P., (specially assigned), JJ.*

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*Opinion by Smith, J.*

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*Filed: February 10, 1981*

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This is the third time we have considered issues growing out of the mail fraud conviction of Gerald Ney Klauber, a member of the Maryland bar. This time we shall disbar.

Bar Counsel, acting on behalf of the Attorney Grievance Commission, filed a petition with us seeking disciplinary action against Klauber because he had been convicted of

violating 18 U.S.C. § 1341 (1970) (mail fraud) and 18 U.S.C. § 1962 (1970) (racketeering). It was alleged that Klauber had violated Disciplinary Rules 1-102; 2-103 b, c, d, and f; 3-103; 5-107 (A), 7-101 (A)(3); 7-102 (A) (2-8, inclusive); and 9-102.

Pursuant to Maryland Rule BV9 we designated the Honorable David Ross, an associate judge of the Eighth Judicial Circuit of Maryland, to hear the charges. He found as a fact that Klauber "was found guilty by a jury in the United States District Court for the District of Maryland of 16 counts of mail fraud . . . and one count of racketeering . . . on April 21, 1978 and was sentenced to concurrent terms of 5 years imprisonment as to each count on June 21, 1978." His conclusions of law were:

> 1. The federal crime of mail fraud (18 U.S.C. § 1341) is a crime involving moral turpitude.
>
> 2. A lawyer who is guilty of the federal crime of mail fraud (18 U.S.C. § 1341) has violated the following disciplinary rules:
>
> DR 1-102(A)(3)
> DR 1-102(A)(4)
> DR 1-102(A)(5)

These disciplinary rules specify that a lawyer shall not engage in illegal conduct involving moral turpitude; conduct involving dishonesty, fraud, deceit, or misrepresentation; or conduct that is prejudicial to the administration of justice.

In *United States v. Klauber,* 611 F.2d 512 (4th Cir. 1979), *cert. denied,* 446 U.S. 908, 100 S. Ct. 1835 (1980), Judge Murnaghan summarized for the court the factual basis for the conviction:

> The scheme or artifice to defraud and the pattern of racketeering activity asserted against Klauber grew out of his conduct as a partner in the law firm of Fine and Klauber, P.A. The evidence at trial permitted a jury conclusion that Klauber was engaged in a practice in which, with respect to personal injury

> cases in which he or his firm represented plaintiffs, Klauber sought inflated statements from doctors in which charges were set forth for visits by the plaintiffs which had not actually occurred. Subsequent to settlements with insurance companies based on such inflated statements from doctors, Klauber reduced the amounts actually remitted to the doctors and sometimes diverted amounts received in settlement with respect to one plaintiff's case to a doctor not involved in the case but retained with respect to some other plaintiff. [*Id.* at 513.]

In his effort to avoid disciplinary action Klauber has filed a number of exceptions to the findings of fact and conclusions of law of the trial judge. They are all bound up, however, in his contention that the trial judge erred in ruling that the offenses of which Klauber was convicted "*per se* involve moral turpitude" and thus that it is improper to discipline Klauber without a development of the underlying issues. He says, "It is obvious that this Court's refusal to suspend Respondent for conviction of a crime involving moral turpitude means *ipso facto* that mail fraud need not, in every case, involve moral turpitude," referring to *Attorney Griev Comm'n v. Klauber,* 283 Md. 597, 391 A.2d 849 (1978) (*Klauber* I). Such is not the case, We shall here attempt to dispel any false impressions which may have arisen as a result of that opinion, that in *Attorney Grievance Comm'n v. Klauber,* 284 Md. 306, 396 A.2d 253 (1979 (*Klauber* II), and the one in *Attorney Grievance Comm'n v. Reamer,* 281 Md. 323, 379 A.2d 171 (1977).

We shall first examine the federal statute and that which has been written relative to it. The statute provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exhange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or

> anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. [18 U.S.C. § 1341 (1970).]

No significant change has been made in the statute since 1909.

The most recent opinion of the Supreme Court on this statute is *Pereira v. United States*, 347 U.S. 1, 74 S. Ct. 358, 98 L. Ed. 435 (1954), in which Chief Justice Warren said for the Court:

> The elements of the offense of mail fraud under 18 U.S.C. (Supp. V) § 1341 are (1) a scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme. It is not necessary that the scheme contemplate the use of the mails as an essential element. *United States v. Young*, 232 U.S. 155. [*Id.* at 8.]

In reviewing convictions under this statute the federal appellate courts consistently have said that to convict under this statute these elements must be established. They usually cite *Pereira* to this effect. See, e.g., *United States v. Bohonus*, 628 F.2d 1167, 1171 (9th Cir.), *cert. denied*, U.S., 100 S. Ct. 3026 (1980); *United States v. Wrehe*, 628 F.2d 1079, 1082 (8th Cir. 1980); *United States v. Jordan*, 626 F.2d 928, 930 (D. C. Cir. 1980); *United States v. Rodgers*, 624 F.2d 1303, 1306 (5th Cir. 1980); *United States v. Freeman*, 619 F.2d 1112, 1117 (5thCir. 1980); *United States v. Brien*, 617 F.2d 299, 307 (1st Cir.), *cert. denied*, 446 U.S. 919, 100 S. Ct. 1854 (1980); *DeMier v. United States*, 616 F.2d 366, 369 (8th

Cir. 1980); *United States v. Kent*, 608 F.2d 542, 545 (5th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980); *United States v. Corbin*, 590 F.2d 398, 402 (1st Cir. 1979); *United States v. McDonald*, 576 F.2d 1350, 1359 (9th Cir.), *cert. denied*, 439 U.S. 830 (1978); *United States v. Pearlstein*, 576 F.2d 531, 537 (3d Cir. 1978); *United States v. Foshee*, 569 F.2d 401, 403 (5th Cir. 1978), *cert. denied*, 444 U.S. 1082 (1979); *United States v. McNeive*, 536 F.2d 1245, 1247 (8th Cir. 1976); *United States v. Bush*, 522 F.2d 641, 648 (7th Cir. 1975), *cert. denied*, 424 U.S. 977 (1976); *United States v. Bryza*, 522 F.2d 414, 421 (7th Cir. 1975), *cert. denied*, 426 U.S. 912 (1976); *United States v. Payne*, 474 F.2d 603, 604 (9th Cir. 1973); and *United States v. Bessesen*, 445 F.2d 463, 468-69 (7th Cir.), *cert. denied*, 404 U.S. 984 (1971). In *Jordan* the court stated:

> During its deliberations the jury sent the following note to the court:
>
> > "The indictment in count seven, charge one, mail fraud, cites approximately $110,000 as the proceeds involved in defendant's alleged scheme to defraud. This is the first time such a sum has appeared and the evidence does not account for this total. Is this pertinent for the jury to know in arriving at a decision? If so, what is the explanation for the $110,000?"
>
> In response the court instructed the jury:
>
> > The Government is not required to prove the details of a scheme: it is, however, required to prove beyond a reasonable doubt the following: that the defendant . . . willfully and knowingly devised a scheme or artifice to defraud. . . and, secondly, that the defendant used the United States Postal Service by mailing or by causing to be mailed some matter or thing for the purpose of executing the scheme to defraud.
>
> The instruction as given was correct in all respects. [*Id.* 626 F.2d at 930.]

In *United States v. Grande*, 620 F.2d 1026 (4th Cir.), *cert. denied*, U.S. 101 S. Ct. 98 (1980), Judge Winter said for the court:

> The thrust of § 1341 is upon misuse of the mails to defraud, not the regulation of state and municipal affairs. *United States v. States*, 488 F.2d 761, 767 (8 Cir. 1973), *cert. denied*, 417 U.S. 909, 94 S. Ct. 2605, 41 L. Ed. 2d 212, *cert. denied*, 417 U.S. 950, 94 S. Ct. 3078, 41 L. Ed. 2d 671 (1974). Defendants' use of the mails, principally to give notice to proceed on contracts for demolition, to send checks in full or partial payment under fraudulently obtained demolition contracts and to mail a bill from one of the contractors for work performed under one such contract are, in our view, sufficiently related to the scheme to defraud to bring defendants within the reach of § 1341. *Pereira v. United States*, 347 U.S. 1, 8, 74 S. Ct. 358, 362, 98 L. Ed. 435 (1954); *United States v. Mandel, supra*, at 1360 n. 9; *United States v. Brewer*, 528 F.2d 492, 494 (4. Cir. 1975). [*Id.* at 1029-30]

In *Freeman* the court observed, "The indictment need not specifically charge, but the government must prove, 'a specific intent to commit fraud,' *United States v. Kent*, 608 F.2d at 545 n. 3 . . ., *id.* at 546." *Id.* at 619 F.2d at 1117.

Law review articles upon the subject include Comment: *Federal Prosecution of Elected State Officials for Mail Fraud: Creative Prosecution or an Affront to Federalism?*, 28 Am. U. L. Rev. 63 (1978); Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duq. L. Rev. 771 (1980); Comment: *The Intangible-Rights Doctrine and Political-Corruption Prosecutions Under the Federal Mail Fraud Statute*, 47 U. of Chi. L. Rev. 562 (1980); Comment, *Survey of the Law of Mail Fraud*, 1975 U. of Ill. L. F. 237 (1975); and Comment: *A Survey of the Mail Fraud Act*, 8 Mem. St. U. L. Rev. 673 (1978). The comment in the University of Illinois Law Forum and the article by Mr. Rakoff, former Chief of Business Frauds Prosecutions of the United States Attorney's Office, contain comprehensive background information relative to the development of the mail fraud

statute and the court decisions thereunder. Although the American University and University of Chicago articles are somewhat critical of use of the statute for some of the more recent prosecutions, no article disputes the fact that fraud is one of the elements of the crime which must be proved in order to obtain a conviction. Mr. Rakoff states, "The truth . . . is that at least since the 1909 amendment, the sole genuine purpose of the mail fraud statute has been to prosecute fraud and the mailing has served primarily as a basis for invoking federal jurisdiction." *Id.* at 819.

Under Rule BV 16 as it existed prior to July 1, 1978, Bar Counsel might petition us to suspend an attorney who was convicted of a crime involving moral turpitude. A petition for such a suspension was before us in *Reamer,* 281 Md. 323. He, too, had been convicted of violation of 18 U.S.C. § 1341 (1970). Chief Judge Murphy said for the Court relative to Reamer's contentions:

> Reamer suggests that in recent years the mail fraud statute has been broadened in scope by decisions of the federal courts and, as a result, the standards for establishing fraudulent intent have been so relaxed that the offense can no longer be considered a crime which, as a matter of course, always involves moral turpitude. In this connection, Reamer argues that the mere fact that he was convicted of mail fraud does not mean that he perpetrated a fraud or possessed a fraudulent or dishonest intent. He claims that a conviction under the mail fraud statute is now permissible in a case similar to his own where, after the attorney settles the claim with the insurance company, he prevails upon the physician, in the best interests of his client, to reduce his fee because the overall settlement was not as advantageous as had been anticipated [*Id.* 281 Md. at 328.]

He then went on to say for the Court:

> We need not decide in this case whether a conviction for mail fraud, in any and all circumstances, will

> always involve moral turpitude. It is enough that we determine in this case, from a review of the allegations of the indictment and the District Court's charge to the jury, and the jury's verdict, that the crimes of which Reamer was convicted plainly involved moral turpitude. [*Id.* at 328.]

*Klauber* I was decided on October 10, 1978. This was prior to the decision of the Fourth Circuit on December 22, 1978, in *United States v. Reamer,* 589 F.2d 769 (4th Cir. 1978). In *Klauber* I, after quoting from our *Reamer,* we set forth a part of the instruction of the trial judge in Klauber's case. We said that it "apparently did not limit a conviction to a finding of moral turpitude as in *Reamer.*" *Id.* 283 Md. at 598. We then said:

> It may follow from this instruction that the jury *could* have found Klauber guilty without finding an intent on his part to defraud. His appeal is still pending. Hence we cannot say at this point in time, particularly before the Fourth Circuit speaks, that Klauber necessarily stands convicted of a crime involving moral turpitude.
>
> It must be borne in mind that Rule BV 16 does not make suspension mandatory, but makes it discretionary in this Court pending resolution of an appeal. In such a proceeding we do not have a full record before us. There has been no testimony adduced under Rule BV 10, and hence no finding of fact under Rule BV 11, as to whether moral turpitude was involved. Since suspension under Rule BV 16, as it was then worded, could occur only upon conviction of a crime involving moral turpitude and, under the same rule, we were dealing with suspension as a *preliminary* matter, without a full record, we held as we did in *Reamer* because our *preliminary* determination awaited *final* resolution of the moral turpitude issue upon appellate review of the conviction. It was our intention in *Reamer* under the rule as it then existed to make plain that we would not — and should not — suspend unless it was absolutely clear that the crime involved moral turtpitude. In *Reamer* we came to recognize the

> difficulties inherent in this rule involving moral turpitude. It was for that reason that on May 5, 1978, effective July 1, 1978, we amended Rule BV 16 to permit suspension of an attorney upon conviction of certain crimes which include a conviction "in any federal court of a felony, unless the same crime also is a crime under Maryland law and is not a felony . . . ." [*Id.* 283 Md. at 599-600 (emphasis in original).][1]

In the Fourth Circuit's *Reamer,* decided after *Klauber,* the court responded to the contention that had been made to us in our *Reamer.* It said:

> He objects primarily to the district court's instructions to the jury that if it found from the evidence that defendant (i) had attempted to suppress evidence or (ii) had knowingly violated the Maryland barratry statute or the professional code of ethics incident to the submission of false medical reports, then it could consider such findings as probative of defendant's criminal intent.
>
> * * * * * *
>
> We think there was ample evidence to support the court's instruction, and it was properly given. The law is well established that, in a criminal case, evidence of a defendant's attempt to influence a witness to testify regardless of the truth is admissible against him on the issue of criminal intent. *See Wilson v. United States,* 162 U.S. 613, 620-21, 16 S. Ct. 895, 40 L. Ed. 1090 (1896); *United States v. Jamar,* 561 F.2d

[1] Attorney Grievance Comm'n v. Klauber, 284 Md. 306, 396 A.2d 253 (1979), *Klauber* II, sheds no light on this controversy. There the Attorney Grievance Commission sought to have Klauber suspended under the revised Rule BV16 which permitted suspension of an attorney upon conviction "in any federal court of a felony, unless the same crime also is a crime under Maryland law and is not a felony . . . ." We held that the revised rule might not be used to suspend Klauber since it did not become effective until July 1, 1978, after Klauber's conviction, and the order adopting the rule did not make it applicable to a judgment entered prior to the effective date of the rule.

1103, 1106-07 (4th Cir. 1977). Therefore, we think the court properly instructed that, if the jury found that the defendant attempted to suppress evidence, it could consider such evidence against him on the issue of consciousness of guilt. *See Allen v. United States,* 164 U.S. 492, 498-500, 17 S. Ct. 154, 41 L. EDD. 525 (1896); 1 Devitt and Blackmar, *Federal Jury Practice and Instructions,* 3rd Ed. § 15.09.

Also, on the issue of criminal intent, the court instructed that state law and the code of professional conduct prohibit the solicitation of clients by attorneys, and the standards for violation of the professional code were read to the jury. The court concluded its charge with the admonition that defendant was not on trial for any conduct not alleged in the indictment. We think this latter instruction was supported by the evidence and was properly given. *See U.S. v. Keane,* 522 F.2d 534, 553-57 (7th Cir. 1975), *cert. denied,* 424 U.S. 976, 96 S. Ct. 1481, 47 L. Ed. 2d 746 (1976). [*Id.* 589 E.2d at 770-71.]

When Klauber's case reached the Fourth Circuit he made no challenge to the instruction concering which we had some doubt in *Klauber* I by reason of the representations then made to us. As his attorney put it at argument before us in this case, they deemed it useless to attack the instruction after the same attorney had been unsuccessful on that issue in the Fourth Circuit's *Reamer.*

In *Attorney Grievance Comm'n v. Walman,* 280 Md. 453, 374 A.2d 354 (1977), we considered the meaning of the term "moral turpitude" in the context of an attorney disciplinary action. Judge Levine there said for the Court:

> The term "moral turpitude" has been defined generally as importing "an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man." *Braverman v. Bar Assn. of Balto.,* 209 Md. 328, 344, 121 A.2d 473, *cert. denied,* 352 U.S. 830 (1956). When applied to the

context in which we deal with it here, the term connotes a fraudulent, *Iowa State Bar Association v. Kraschel,* 260 Iowa 187, 148 N.W.2d 621, 627 (1967), or dishonest, *Committee of Legal Ethics v. Scherr,* 149 W. Va. 721, 143 S.E.2d 141, 147 (1965), intent. As Justice Traynor said for the California Supreme Court in *In re Hallinan,* 43 Cal.2d 243, 272 P.2d 768, 771 (1954), *appeal after remand,* 48 Cal.2d 52, 307 P.2d 1 (1957):

> "Although the problem of defining moral turpitude is not without difficulty (citations omitted), it is settled that whatever else it may mean, it includes *fraud* and that a crime in which an intent to defraud is an essential element is a crime involving moral turpitude. (Citations omitted). It is also settled that the related group of offenses involving *intentional dishonesty* for purposes of personal gain are crimes involving moral turpitude. . . ." (Citations omitted; emphasis added).

[*Id.* at 459-60.]

Any doubts we might have had as to the continued viability of the concept that a violation of § 1341 is a crime involving moral turpitude have been dispelled by the Fourth Circuit's *Reamer* and *Klauber* and the continued statements by each United States Court of Appeals that fraud is an essential element which must be proved in order for there to be a conviction under this statute. Hence, we have no hesitancy in saying once again, as we did in *Maryland St. Bar Ass'n v. Kerr,* 272 Md. 687, 690, 326 A.2d 180 (1974), mail fraud is "a crime plainly involving moral turpitude . . . ." Moreover, the summary by Judge Murnaghan for the Fourth Circuit in its *Klauber* makes plain that fraud was involved in this case.

Rule BV10 e 1 states in pertinent part:

> In a hearing of charges pursuant to this Rule, a final judgment by a judicial tribunal in another proceeding convicting an attorney of a crime shall be

> conclusive proof of the guilt of the attorney of that crime.

In *Maryland St. Bar Ass'n v. Rosenberg,* 273 Md. 351, 354-55, 329 A.2d 106 (1974), Chief Judge Murphy said for the Court that "other states provide, as we do, by rule, statute, or case law, that a conviction of an attorney is conclusive proof of guilt," citing a number of cases, and that "[t]he constitutionality of these procedures has not been seriously questioned." Judge Digges referred for the Court to the very similar predecessor rule in *Bar Ass'n of Balto. City v. Siegel,* 275 Md. 521, 340 A.2d 710 (1975):

> Based on this rule and based on the cases which have applied it, *see Maryland St. Bar Ass'n v. Rosenberg,* 273 Md. 351, 329 A.2d 106 (1974); *Maryland St. Bar Ass'n v. Kerr,* 272 Md. 687, 326 A.2d 180 (1974); *Maryland St. Bar Ass'n v. Agnew, supra*; *see also* concurring opinion in *In re Braverman,* 271 Md. 196, 212, 316 A.2d 246 (1974), we must conclude, regardless of what the respondent suggests, that the final judgment of the United States District Court for the District of Maryland, entered after Mr. Siegel's nolo contendere plea, is conclusive proof of his guilt of the crime charged. [*Id.* at 528.]

Accordingly, under Rule BV10 e 1 and our prior cases Klauber may not now attack the factual underpinnings of his conviction. It becomes entirely proper to discipline him without a development of the underlying issues. Thus, we have before us for disposition the case of a lawyer who stands convicted of fraud, a crime involving moral turpitude.

We have repeatedly and consistently held that conduct involving moral turpitude will result in disbarment in the absence of compelling circumstances justifying a lesser sanction. See, e.g., *Attorney Griev. Comm'n v. Barnes,* 286 Md. 474, 481, 408 A.2d 719 (1979); *Bar Ass'n of Balto. City v. Siegel, supra,* 275 Md. at 529; *Maryland St. Bar Ass'n v. Kerr, supra,* 272 Md. at 690; *Maryland St. Bar Ass'n v. Agnew,* 271 Md. 543, 553, 318 A.2d 811 (1974), and cases

there cited. No compelling circumstances justifying a lesser sanction have been presented here. Thus, it follows that the sanction to be imposed is disbarment.

*IT IS SO ORDERED; RESPONDENT SHALL PAY ALL COSTS AS TAXED BY THE CLERK OF THIS COURT INCLUDING COSTS OF ALL TRANSCRIPTS PURSUANT TO MARYLAND RULE BV16 c FOR WHICH SUM JUDGMENT IS ENTERED IN FAVOR OF THE ATTORNEY GRIEVANCE COMMISSION AGAINST GERALD NEY KLAUBER.*

Although participating in the hearing on this matter, Judge Eldridge took no part in the consideration or decision of this case.

APPENDIX III

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*In The United States District Court*
*for the District of Maryland*

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*Criminal No. H-77-0566*

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*(Mail Fraud, 18 U.S.C. § 1341; Prohibited Activities, 18 U.S.C. § 1962; Aiding and Abetting, 18 U.S.C. § 2)*

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*United States of America*

*v.*

*Howard Fine and Gerald N. Klauber*

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The Grand Jury for the District of Maryland charges:

1. At all times pertinent to this indictment Howard Fine and Gerald N. Klauber were attorneys-at-law engaged in the practice of law in the City of Baltimore and the State of Maryland.

2. At all times pertinent to this indictment Howard Fine and Gerald N. Klauber were associated together in the practice of law originally as Fine & Klauber, partnership and as of April 22, 1971 as Fine & Klauber, P.A. (professional association).

3. At all times pertinent to this indictment,

State Farm Insurance Company
Maryland Indemnity Insurance Company
Aetna Insurance Company

Government Employees Insurance Company
Transit Casualty Company
Nationwide Insurance
Allstate Insurance Company
Maryland Casualty

were companies which provided to owners of motor vehicles in the State of Maryland automobile liability insurance which covered claims for property damage and/or bodily injury resulting from accidents involving insured motor vehicles.

4. At all times pertinent to this indictment CNA Insurance was a company which provided liability insurance to persons in the State of Maryland which covered claims for bodily injury occurring on or about the premises of insured persons.

5. From a date unknown, but beginning prior to January 1, 1971 and continuing up to and including May 28, 1975, and thereafter continuing to a date unknown, in the State and District of Maryland, Howard Fine and Gerald N. Klauber, the defendants, willfully and knowingly devised and intended to devise a scheme and artifice to defraud to obtain money and property by means of false and fraudulent pretenses, representations and promises from the insurance companies named in paragraphs 3 and 4 above, and attempted to do so, the defendants then well knowing that the pretenses, representations and promises were false and fraudulent when made.

6. It was a part of the scheme and artifice to defraud that the defendants in the course of conducting the practice of law represented persons who claimed to have been injured in motor vehicle and other accidents (hereinafter referred to as "clients") caused by the negligence of others.

7. It was a further part of the scheme and artifice to defraud that the defendants referred their clients to certain physicians who, in connection with the claims of

the clients against the persons causing the accidents and their insurance companies, prepared and supplied to the defendants false and fraudulent medical reports and bills which the defendants utilized to obtain and attempt to obtain monetary settlements from the insurance companies, knowing that the medical reports and bills were false and fraudulent.

8. It was a further part of the scheme and artifice to defraud that the medical bills and reports which the defendants utilized to obtain monetary settlements were falsified in one or more of the following ways:

a. The defendants utilized medical bills which had been inflated by including in the bills charges for visits purportedly made by clients to the physician's office for medical services and treatment when in truth and fact those visits had not been made.

b. The defendants utilized medical bills and reports which represented that certain medical treatment and services had been rendered to clients when in truth and fact those medical services had not been rendered.

c. The defendants utilized medical reports which falsified and exaggerated the injuries purportedly sustained by certain clients.

9. It was a further part of the scheme and artifice to defraud that the defendants, as their option, could pay and the physicians would accept substantially reduced payments in full satisfaction of the charges set forth in the bills for medical services rendered to the defendants' clients, which option the defendants did not disclose to the insurance companies.

10. It was a further part of the scheme and artifice to defraud that the defendants, without the knowledge or authorization of certain clients, retained a portion of the settlement proceeds to which the clients were entitled.

11. It was a further part of the scheme and artifice to defraud that the defendants employed "runners", individuals who procured persons allegedly injured in motor vehicle accidents as clients for the defendants in return for cash payments from the defendants.

12. It was a further part of the scheme and artifice to defraud that for the purpose of procuring as clients persons allegedly injured in motor vehicle accidents, the defendants agreed to and did make cash payments to certain employees of the Mass Transit Administration (Baltimore City) and other persons who referred persons allegedly injured in motor vehicle accidents to the defendants.

13. It was a further part of the scheme and artifice to defraud that the defendants urged, induced, suggested, counseled and caused certain clients to take time off from work, which the clients would not otherwise have taken.

14. It was a further part of the scheme and artifice to defraud that the defendants, to facilitate the settlement of motor vehicle bodily injury claims, paid cash kickbacks to certain insurance adjusters or employees of insurance companies.

15. On or about the 16th day of January, 1973, in the State and District of Maryland,

HOWARD FINE
and
GERALD N. KLAUBER

the defendants, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly did cause to be delivered by mail, according to the direction thereon, a letter addressed to Howard Fine, Attorney At Law, Equitable Building — Suite 44, Calvert & Fayette Streets, Baltimore, Maryland 21202.

18 U.S.C. §§ 1341 and 2

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*COUNT TWO*

And the Grand Jury for the District of Maryland further charges:

1. The allegations contained in paragraphs 1 through 14 of this indictment are realleged and incorporated herein as though fully set out in this count of the indictment.

2. On or about the 8th day of March, 1973, in the State and District of Maryland,

HOWARD FINE
and
GERALD N. KLAUBER

the defendants, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly did cause to be delivered by mail, according to the direction thereon, a letter addressed to Maryland Indemnity Insurance Co., 10 S. Calvert Street, Baltimore, Maryland, 21202.

18 U.S.C. §§ 1341 and 2

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*COUNT THREE*

And the Grand Jury for the District of Maryland further charges:

1. The allegations contained in paragraphs 1 through 14 of this indictment are realleged and incorporated herein as though fully set out in this count of the indictment.

2. On or about the 8th day of August, 1973, in the State and District of Maryland,

HOWARD FINE
and
GERALD N. KLAUBER

the defendants, for the purpose of executing the aforesaid

scheme and artifice to defraud and attempting to do so, knowingly did cause to be delivered by mail, according to the direction thereon, a letter addressed to Michael H. Simons, 44 Equitable Building, Baltimore, Maryland 21202.

18 U.S.C. §§ 1341 and 2

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*COUNT FOUR*

And the Grand Jury for the District of Maryland further charges:

1. The allegations contained in paragraphs 1 through 14 of this indictment are realleged and incorporated herein as though fully set out in this count of the indictment.

2. On or about the 11th day of May, 1973, in the State and District of Maryland

HOWARD FINE
and
GERALD N. KLAUBER

the defendants, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly did cause to be delivered by mail, according to the direction thereon, a letter addressed to Aetna Casualty & Surety, 1500 Maryland National Bank Bldg., Baltimore, Maryland, 21202.

18 U.S.C. §§ 1341 and 2

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*COUNT FIVE*

And the Grand Jury for the District of Maryland further charges:

1. The allegations contained in paragraphs 1 through

14 of this indictment are realleged and incorporated herein as though fully set out in this count of the indictment.

2. On or about the 7th day of June, 1973, in the State and District of Maryland,

HOWARD FINE
and
GERALD N. KLAUBER

the defendants, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly did cause to be delivered by mail, according to the direction thereon, a letter addressed to Gerald N. Klauber, Attorney At Law, Equitable Building — Suite 44, Calvert & Fayette Streets, Baltimore, Maryland 21202.

18 U.S.C. §§ 1341 and 2

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*COUNT SIX*

And the Grand Jury for the District of Maryland further charges:

1. The allegations contained in paragraphs 1 through 14 of this indictment are realleged and incorporated herein as though fully set out in this count of the indictment.

2. On or about the 26th day of June, 1973, in the State and District of Maryland,

HOWARD FINE
and
GERALD N. KLAUBER

the defendants, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly did cause to be delivered by mail, according to the direction thereon, a letter addressed to Roger Powell,

Attorney at Law, 44 Equitable Building, Calvert & Fayette Streets, Baltimore, Maryland 21202.

18 U.S.C. §§ 1341 and 2

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*COUNT SEVEN*

And the Grand Jury for the District of Maryland further charges:

1. The allegations contained in paragraphs 1 through 14 of this indictment are realleged and incorporated herein as though fully set out in this count of the indictment.

2. On or about the 6th day of July, 1973, in the State and District of Maryland,

HOWARD FINE
and
GERALD N. KLAUBER

the defendants, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly did cause to be delivered by mail, according to the direction thereon, a letter addressed to CNA Insurance Co., 201 N. Charles Street, Baltimore, Md. 21201.

18 U.S.C. §§ 1341 and 2

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*COUNT EIGHT*

And the Grand Jury for the District of Maryland further charges:

1. The allegations contained in paragraphs 1 through 14 of this indictment are realleged and incorporated herein as though fully set out in this count of the indictment.

2. On or about the 11th day of July, 1973, in the State and District of Maryland,

HOWARD FINE
and
GERALD N. KLAUBER

the defendants, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly did cause to be delivered by mail, according to the direction thereon, a letter addressed to Fine & Klauber, Attorneys at Law, Suite 44 Equitable Bldg., Baltimore, Md. 21202.

18 U.S.C. §§1341 and 2

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*COUNT NINE*

And the Grand Jury for the District of Maryland further charges:

1. The allegations contained in paragraphs 1 through 14 of this indictment are realleged and incorporated herein as though fully set out in this count of the indictment.

2. On or about the 29th day of August, 1973, in the State and District of Maryland,

HOWARD FINE
and
GERALD N. KLAUBER

the defendants, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly did cause to be delivered by mail, according to the direction thereon, a letter addressed to Nationwide Insurance Company, 2500 Riva Road, S.E., Annapolis, Maryland 21401.

18 U.S.C. §§ 1341 and 2

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*COUNT TEN*

And the Grand Jury for the District of Maryland further charges:

1. The allegations contained in paragraphs 1 through 14 of this indictment are realleged and incorporated herein as though fully set out in this count of the indictment.

2. On or about the 7th day of September, 1973, in the State and District of Maryland,

HOWARD FINE
and
GERALD N. KLAUBER

the defendants, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly did cause to be delivered by mail, according to the direction thereon, a letter addressed to Gerald Klauber, Attorney at Law, 44 Equitable Building, Baltimore, Maryland 21202.

18 U.S.C. §§ 1341 and 2

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*COUNT ELEVEN*

And the Grand Jury for the District of Maryland further charges:

1. The allegations contained in paragraphs 1 through 14 of this indictment are realleged and incorporated herein as though fully set out in this count of the indictment.

2. On or about the 3rd day of October, 1973, in the State and District of Maryland,

HOWARD FINE
and
GERALD N. KLAUBER

the defendants, for the purpose of executing the aforesaid

scheme and artifice to defraud and attempting to do so, knowingly did cause to be delivered by mail, according to the direction thereon, a letter addressed to Government Employees Insurance Co., #1 Investment Place, Towson, Md. 21204.

18 U.S.C. §§ 1341 and 2

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*COUNT TWELVE*

And the Grand Jury for the District of Maryland further charges:

1. The allegations contained in paragraphs 1 through 14 of this indictment are realleged and incorporated herein as though fully set out in this count of the indictment.

2. On or about the 4th day of October, 1973, in the State and District of Maryland,

HOWARD FINE
and
GERALD N. KLAUBER

the defendants, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly did cause to be delivered by mail, according to the direction thereon, a letter addressed to Gerald N. Klauber, Attorney, Equitable Bldg. Suite 44, Calvert & Fayette Sts., Baltimore, Md. 21202.

18 U.S.C. §§ 1341 and 2

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*COUNT THIRTEEN*

And the Grand Jury for the District of Maryland further charges:

1. The allegations contained in paragraphs 1 through

14 of this indictment are realleged and incorporated herein as though fully set out in this count of the indictment.

2. On or about the 26th day of October, 1973, in the State and District of Maryland,

HOWARD FINE
and
GERALD N. KLAUBER

the defendants, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly did cause to be delivered by mail, according to the direction therein, a letter addressed to Mr. Edward Hrica, CNA Insurance Company, 201 N. Charles Street, Suite 810, Baltimore, Md. 21201.

18 U.S.C. §§1341 and 2

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*COUNT FOURTEEN*

And the Grand Jury for the District of Maryland further charges:

1. The allegations contained in paragraphs 1 through 14 of this indictment are realleged and incorporated herein as though fully set out in this count of the indictment.

2. On or about the 4th day of March, 1974, in the State and District of Maryland,

HOWARD FINE
and
GERALD N. KLAUBER

the defendants, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly did cause to be delivered by mail, according to the direction thereon, a letter addressed to Gerald N.

Klauber, Attorney at Law, Suite 44, Equitable Building, Calvert & Fayette Streets, Baltimore, Maryland 21202.

18 U.S.C. §§ 1341 and 2

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*COUNT FIFTEEN*

And the Grand Jury for the District of Maryland further charges:

1. The allegations contained in paragraphs 1 through 14 of this indictment are realleged and incorporated herein as though fully set out in this count of the indictment.

2. On or about the 11th day of December, 1973, in the State and District of Maryland,

HOWARD FINE
and
GERALD N. KLAUBER

the defendants, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly did cause to be delivered by mail, according to the direction thereon, a letter addressed to State Farm Mutual Automobile Ins. Co., 1715 Gwynn Oak Avenue, Baltimore, Maryland 21207.

18 U.S.C. §§ 1341 and 2

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*COUNT SIXTEEN*

And the Grand Jury for the District of Maryland further charges:

1. The allegations contained in paragraphs 1 through 14 of this indictment are realleged and incorporated herein as though fully set out in this count of the indictment.

2. On or about the 10th day of January, 1974, in the State and District of Maryland,

HOWARD FINE
and
GERALD N. KLAUBER

the defendants, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly did cause to be delivered by mail, according to the direction thereon, a letter addressed to Howard Fine, Esq., Equitable Building — Suite 44, Calvert & Fayette Streets, Baltimore, Maryland 21202.

18 U.S.C. §§ 1341 and 2

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*COUNT SEVENTEEN*

And the Grand Jury for the District of Maryland further charges:

1. The allegations contained in paragraphs 1 through 14 of this indictment are realleged and incorporated herein as though fully set out in this count of the indictment.

2. On or about the 11th day of January, 1974, in the State and District of Maryland,

HOWARD FINE
and
GERALD N. KLAUBER

the defendants, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly did cause to be delivered by mail, according to the direction thereon, a letter addressed to Allstate Insurance Company, 8722 Loch Raven Boulevard, Baltimore, Maryland 21204.

18 U.S.C. §§ 1341 and 2

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*COUNT EIGHTEEN*

And the Grand Jury for the District of Maryland further charges:

1. The allegations contained in paragraphs 1 through 14 of this indictment are realleged and incorporated herein as though fully set out in this count of the indictment.

2. On or about the 23rd day of May, 1974, in the State and District of Maryland,

HOWARD FINE
AND
GERALD N. KLAUBER

the defendants, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly did cuse to be delivered by mail, according to the direction thereon, a letter addressed to Gerald N. Klauber, Esq., Suite 44 Equitable Building, Calvert and Fayette Streets, Baltimore, Maryland 21202.

18 U.S.C. § § 1341 and 2

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*COUNT NINETEEN*

And the Grand Jury for the District of Maryland further charges:

1. The allegations contained in paragraphs 1 through 14 of this indictment are realleged and incorporated herein as though fully set out in this count of the indictment.

2. On or about the 30th day of January, 1974, in the State and District of Maryland,

HOWARD FINE
and
GERALD N. KLAUBER

the defendants, for the purpose of executing the aforesaid

scheme and artifice to defraud and attempting to do so, knowingly did cause to be delivered by mail, according to the direction thereon, a letter addressed to Allstate Insurance Company, 8722 Loch Raven Boulevard, Baltimore, Maryland 21204

18 U.S.C. § § 1341 and 2

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*COUNT TWENTY*

And the Grand Jury for the District of Maryland further charges:

1. The allegations contained in paragraphs 1 through 14 of this indictment are realleged and incorporated herein as though fully set out in this count of the indictment.

2. On or about the 31st day of January, 1974, in the State and District of Maryland,

HOWARD FINE
and
GERALD N. KLAUBER

the defendants, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly did cause to be delivered by mail, according to the direction thereon, a letter addressed to Howard Fine, Attorney at Law, 44 Equitable Bldg., Baltimore, MD 21202.

18 U.S.C. § § 1341 and 2

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*COUNT TWENTY ONE*

And the Grand Jury for the District of Maryland further charges:

1. The allegations contained in paragraphs 1 through

14 of this indictment are realleged and incorporated herein as though fully set out in this count of the indictment.

2. On or about the 28th day of February, 1974, in the State and District of Maryland,

HOWARD FINE
and
GERALD N. KLAUBER

the defendants, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly did cause to be delivered by mail, according to the direction thereon, a letter addressed to Maryland Indemnity Company, 10 S. Calvert Street, Baltimore, Maryland.

18 U.S.C. §§ 1341 and 2

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*COUNT TWENTY TWO*

And the Grand Jury for the District of Maryland further charges:

1. The allegations contained in paragraphs 1 through 14 of this indictment are realleged and incorporated herein as though fully set out in this count of the indictment.

2. On or about the 6th day of March, 1974, in the State and District of Maryland,

HOWARD FINE
and
GERALD N. KLAUBER

the defendants, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly did cause to be delivered by mail, according to the direction thereon, a letter addressed to State Farm

Mutural Automobile, Insurance Company, 1715 Gwynn Oak Avenue, Baltimore, Md. 21207.

18 U.S.C. §§ 1341 and 2

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*COUNT TWENTY THREE*

And the Grand Jury for the District of Maryland further charges:

1. The allegations contained in paragraphs 1 through 14 of this indictment are realleged and incorporated herein as though fully set out in this count of the indictment.

2. On or about the 10th day of April, 1974, in the State and District of Maryland,

HOWARD FINE
and
GERALD N. KLAUBER

the defendants, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly did cause to be delivered by mail, according to the direction thereon, a letter addressed to Gerald N. Klauber, Atty. at Law, 44 Equitable Building, Calvert and Fayette Streets, Baltimore, Maryland 21202.

18 U.S.C. §§ 1341 and 2

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*COUNT TWENTY FOUR*

And the Grand Jury for the District of Maryland further charges:

1. The allegations contained in paragraphs 1 through 14 of this indictment are realleged and incorporated herein as though fully set out in this count of the indictment.

2. On or about the 12th day of July, 1974, in the State and District of Maryland,

HOWARD FINE
and
GERALD N. KLAUBER

the defendants, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly did cause to be delivered by mail, according to the direction thereon, a letter addressed to Mr. Charles Brocato, Maryland Indemnity Insurance Company, Maryland Indemnity Building, Baltimore, Maryland 21202.

18 U.S.C. § § 1341 and 2

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*COUNT TWENTY FIVE*

And the Grand Jury for the District of Maryland further charges:

1. The allegations contained in paragraphs 1 through 14 of this indictment are realleged and incorporated herein as though fully set out in this count of the indictment.

2. On or about the 19th day of May, 1975, in the State and District of Maryland,

HOWARD FINE
and
GERALD N. KLAUBER

the defendants, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly did cause to be delivered by mail, according to the direction thereon, a letter addressed to Edward J. Thompson, Esquire, 1515 Washington Boulevard, Baltimore, Maryland 21230.

18 U.S.C. § § 1341 and 2

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*COUNT TWENTY SIX*

And the Grand Jury for the District of Maryland further charges:

1. The allegations contained in paragraphs 1 through 14 of this indictment are realleged and incorporated herein as though fully set out in this count of the indictment.

2. On or about the 28th day of May, 1975, in the State and District of Maryland,

HOWARD FINE
and
GERALD N. KLAUBER

the defendants, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly did cause to be delivered by mail, according to the direction thereon, a letter addressed to Howard Fine, Esquire, 44 Equitable Building, Calvert and Fayette Streets, Baltimore, Maryland 21202.

18 U.S.C. §§ 1341 and 2

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*COUNT TWENTY SEVEN*

And the Grand Jury for the District of Maryland further charges:

1. At all times pertinent to this indictment, Fine & Klauber, P.A. was a professional association with offices located in Baltimore City, Maryland, and was formed for the purpose of engaging in the practice of law in Baltimore City and the State of Maryland, and more particularly, was engaged in the business of representing persons in connection with claims for bodily injuries resulting from motor vehicle accidents and other accidents caused by the negligence of others.

2. At all times pertinent to this indictment Howard Fine and Gerald N. Klauber were attorneys licensed to practice law in the State of Maryland and were the principal owners of Fine & Klauber, P.A., each owning 49% of the corporate stock.

3. At all times pertinent to this indictment Fine & Klauber, P.A. was an "enterprise" within the definition contained in 18 U.S.C. § 1961(4), and was engaged in interstate commerce and in activities which affect interstate commerce.

4. From on or about April 22, 1971, up to and including May 28, 1975, and thereafter continuing to a date unknown, in the State and District of Maryland,

HOWARD FINE
and
GERALD N. KLAUBER

the defendants, being persons associated with Fine & Klauber, P.A., did conduct and participate, directly and indirectly, in the conduct of the affairs of Fine & Klauber, P.A., through a "pattern of racketeering activity," including mail fraud as defined in 18 U.S.C. §§ 1961(1)(B) and 1961(5), and as hereinafter described.

5. The pattern of racketeering activity participated in and conducted by Howard Fine and Gerald N. Klauber included the following:

(a) Twenty-six federal mail fraud violations, which are charged in counts 1 through 26 of this indictment and which are realleged and incorporated herein by reference as though fully set out in this count of the indictment.

(b) Two federal mail fraud violations, namely:

1. On or about the 13th day of September, 1972, in the State and District of Maryland,

HOWARD FINE
and
GERALD N. KLAUBER

the defendants, for the purpose of executing the scheme and artifice to defraud alleged in count one of this indictment and attempting to do so, knowingly did cause to be delivered by mail, according to the direction thereon, a letter addressed to Association of Independent Taxi Operators, Inc., 1920 Ashburton Street, Baltimore, Maryland 21216.

2. On or about the 27th day of November, 1971, in the State and District of Maryland,

HOWARD FINE
and
GERALD N. KLAUBER

the defendants, for the purpose of executing the scheme and artifice to defraud alleged in count one of this indictment and attempting to do so, knowingly did cause to be delivered by mail, according to the direction thereon, a letter addressed to Allstate Insurance Company, 8722 Loch Raven Blvd., Baltimore, Maryland 21204.

6. The respective 49% interests of Howard Fine and Gerald N. Klauber in Fine & Klauber, P.A., an enterprise the defendants established, operated, controlled, conducted and participated in the conduct of, in violation of 18 U.S.C. § 1962(c), are to their full extent subject to forfeiture to the United States of America under the provisions of 18 U.S.C. § 1963(a).

18 U.S.C. §§ 1961, 1962(c), 1963 and 2

JERVIS S. FINNEY,
United States Attorney.

A TRUE BILL:

FRANCIS X. DORR,
Foreman.

## APPENDIX IV

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ATTORNEY GRIEVANCE COMMISSION OF MARYLAND

July 18, 1980

PRIVATE AND CONFIDENTIAL

Joseph L. Evans, Esquire
Suite 909
Charles Center South
36 South Charles Street
Baltimore, Maryland 21201

RE: BC Docket No. 78-202-4

Dear Mr. Evans:

Here, as you requested, is my assurance that I will introduce into evidence the Indictment, the Judgment/Commitment Order and the docket entries, and that I will present no live testimony in my case in chief.

This will also confirm that you and Mr. Marr will not object to the introduction of these documents at the trial and that it will not be necessary for me to produce the Clerk of the U.S. District Court to authenticate these documents.

Very truly yours,

WALTER D. MURPHY, JR.
Assistant Bar Counsel.